

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VASILIIY KOZOREZOV, *et al.*,

Plaintiffs,

v.

BANK OF AMERICA, N.A., *et al.*,

Defendants.

Case No. C09-1729RSL

ORDER GRANTING
MOTION TO DISMISS

I. INTRODUCTION

This matter comes before the Court on a motion to dismiss filed by defendants Bank of America, N.A., Mortgage Electronic Registration System, Inc., and Recontrust Company, N.A. (collectively, “defendants”). Plaintiffs assert that defendants violated the Truth in Lending Act (“TILA”) by giving them inaccurate and incomplete disclosures when they refinanced their home. Plaintiffs seek damages, rescission, and injunctive relief.

For the reasons set forth below, the Court grants defendants’ motion.

II. DISCUSSION

A. Background Facts.

Plaintiffs refinanced their home in 2007. As part of that process, on November 30, 2007, they signed loan documents, including two TILA disclosure forms and a HUD-1 Settlement

1 Statement. Due to the subsequent economic downturn, plaintiffs were late and/or missed several
2 payments. Plaintiffs filed this action in Snohomish County Superior Court on September 9,
3 2009, seeking, among other things, to prevent the sale of their home. Defendants subsequently
4 removed the case to this Court based on the assertion of a federal claim.

5 Plaintiffs note that defendants sent them additional TILA disclosures in April 2009, long
6 after the transaction had been consummated. They argue that the late disclosure prevented them
7 from making an informed decision about whether to enter into the refinance transaction in
8 November 2007.

9 **B. Dismissal Standard.**

10 Defendants have filed a 12(b)(6) motion for failure to state a claim upon which relief can
11 be granted. The complaint should be liberally construed in favor of the plaintiff and its factual
12 allegations taken as true. See, e.g., Oscar v. Univ. Students Co-Operative Ass'n, 965 F.2d 783,
13 785 (9th Cir. 1992). The Supreme Court has explained that “when allegations in a complaint,
14 however true, could not raise a claim of entitlement to relief, this basic deficiency should be
15 exposed at the point of minimum expenditure of time and money by the parties and the court.”
16 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007) (internal citation and quotation
17 omitted).

18 Plaintiffs appended numerous documents to their amended complaint, and both parties
19 have cited to those documents. The Court has considered the documents attached to the
20 amended complaint.

21 **C. Analysis.**

22 The purpose of TILA is to increase the amount of information available regarding the true
23 costs of borrowing as a means of promoting economic stabilization, the enhancement of
24 competition among lenders, and the protection of consumers. See 15 U.S.C. § 1601. TILA
25 regulations (promulgated by the Federal Reserve Board at Regulation Z (Part 226 of Title 12 of
26 the Code of Federal Regulations)) require that specific information be disclosed to potential
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1 consumers within a certain time frame. As the Ninth Circuit noted in King v. State of California,
2 748 F.2d 910, 915 (9th Cir. 1986), “courts have construed TILA as a remedial statute,
3 interpreting it liberally for the consumer.”

4 A plaintiff asserting a TILA claim must bring an action “within one year from the date of
5 the occurrence of the violation.” 15 U.S.C. § 1640(e). The Ninth Circuit has held that “the
6 limitations period in Section 1640(e) runs from the date of consummation of the transaction but
7 that the doctrine of equitable tolling may, in the appropriate circumstances, suspend the
8 limitations period until the borrower discovers or had reasonable opportunity to discover the
9 fraud or nondisclosures that form the basis of the TILA action.” King, 784 F.2d at 915. The
10 Ninth Circuit has stated that “[w]hen a motion to dismiss is based on the running of the statute of
11 limitations, it can be granted only if the assertions of the complaint, read with the required
12 liberality, would not permit the plaintiff to prove that the statute was tolled.” Jablon v. Dean
13 Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980).

14 Plaintiffs assert two violations of TILA, both of which occurred in November 2007 when
15 plaintiffs received the forms, long before they filed suit in this matter: (1) they contend that the
16 TILA forms they received in November 2007 were inaccurate, and (2) that the forms were
17 incomplete. Regarding the first issue, plaintiffs contend that the two TILA disclosures they
18 received in November 2007 contained different information as to important terms: “One of the
19 TILA forms indicates that the loan has a variable rate feature, the other TILA form does not.”
20 Response at p. 3. Assuming that the forms contained inaccuracies, that violation could have, and
21 should have, been discovered more than one year before this case was filed. Simply reading and
22 comparing the documents would have alerted plaintiffs to the fact that they contained different
23 terms. Had they done so, plaintiffs would have discovered the alleged violation. Therefore,
24 plaintiffs had the information they needed to bring a TILA action regarding the alleged
25 inaccuracies at the time the loan was consummated, and the claim is time barred.

26 Second, plaintiffs contend that the TILA disclosures they received in November 2007

1 were incomplete because they failed to include an “Itemization of Amount Financed.” The
2 itemization, however, was not required. A good faith estimate (“GFE”) of settlement costs
3 provided under the Real Estate Settlement Procedures Act (“RESPA”) may be substituted for an
4 itemization of amount financed. 12 C.F.R. § 226.18 n.39; 12 C.F.R. § 226.18(c) cmt. 4
5 (“Transactions subject to RESPA are exempt from the requirements of section 226.18(c), when
6 the creditor complies with the good faith estimate requirements of RESPA.”). In this case,
7 plaintiffs do not dispute that the transaction was subject to RESPA or that defendants complied
8 with the good faith estimate requirements of RESPA. Accordingly, plaintiffs’ TILA claim based
9 on the alleged failure to provide an itemization of amount financed fails as a matter of law.

10 Moreover, even if the GFE did not satisfy defendants’ obligations, plaintiffs’ claim
11 regarding the failure to provide the itemization is time barred. Although plaintiffs seek to
12 equitably toll the running of the statute of limitations until April 2009 when they received an
13 additional four pages of TILA disclosures, they concede that they had seen two of the pages
14 previously. Response at p. 3. Plaintiffs contend that the other two allegedly omitted pages
15 contained an “itemization of Amount Financed” that included “important information that would
16 have been relevant to Plaintiffs in their consideration of the loan at the time they were making
17 the decision as to the cost of the loan.” Id. Plaintiffs concede that “the information on them
18 apparently had been included in the HUD-1 Statement signed by Plaintiffs on November 30,
19 2007, of which HUD-1 Statement Plaintiffs received a copy.” Id. Furthermore, comparing the
20 allegedly omitted page that contains the “itemization” (Amended Complaint, Ex. VK-3 at p. 13)
21 with the HUD-1 Statement (Amended Complaint, Ex. VK-1) confirms that all of the costs,
22 except one, listed in the itemization were listed in the timely disclosed HUD-1 Statement. The
23 only cost not identically listed in the HUD-1 Statement is the \$4,170.00 loan origination fee,
24 which is included in the TILA disclosures plaintiffs received in November 2007 (Amended
25 Complaint, Ex. VK-3 at p. 12). Because plaintiffs had all of the information in November 2007,
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1 the April 2009 disclosures do not support equitable tolling.¹ Therefore, plaintiffs' TILA claims
2 arising out of those disclosures are barred by the one-year statute of limitation.

3 Plaintiffs contend that even if their damages claim is time barred, their TILA claims for
4 offset and recoupment are not. TILA makes exceptions from its one year statute of limitations
5 for recoupment and offset. However, as plaintiffs acknowledge in their response, offset and
6 recoupment are defenses, not affirmative claims. The exceptions do not apply in this case
7 because plaintiffs initiated this action. See, e.g., Henderson v. GMAC Mortgage Corp., 2009
8 WL 3059809 at *2 (9th Cir. 2009 (holding that plaintiffs' "claims cannot be salvaged under a
9 theory of recoupment because [plaintiffs], not [defendant], initiated this action.")).²

10 In addition to seeking damages under TILA, plaintiffs also seek to rescind their loan. A
11 consumer entering into the kind of credit transaction at issue in this case has the right to rescind
12 until midnight of the third business day following (a) consummation of the transaction, (b)
13 delivery of the notice of the right to rescind, or (c) delivery of all material disclosures, whichever
14 occurs last. 12 C.F.R. § 226.23(a). In this case, the transaction was consummated
15 approximately two years before plaintiffs filed suit. In their response, plaintiffs cite cases that
16 applied a three-year right of rescission. The three-year right applies only if the consumer did not
17 receive notice of the right to rescind. Plaintiffs concede that they received all material
18 disclosures by April 23, 2009, when they were provided with the additional TILA disclosures.
19 Accordingly, plaintiffs' right to rescind their loan ended well before they filed suit, and their
20 claim for rescission is time barred.

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22 ¹ In addition, defendants argue, and plaintiffs do not dispute, that the terms contained in
23 the 2009 disclosures were actually more favorable to plaintiffs. Therefore, the less favorable
24 terms did not induce plaintiffs into consummating the loan.

25 ² See also Bednaruk v. NW Trustee Services, Inc., 2010 WL 545643 at *3 (W.D. Wash.
26 Feb. 9, 2010 (rejecting plaintiffs' attempt to affirmatively assert claims for recoupment and
27 setoff); Moon v. GMAC Mortgage Corp., 2009 WL 3185596 at *3 (W.D. Wash. Oct. 2, 2009);
Kotok v. Homecomings Financial, 2009 WL 1652151 at *3 (W.D. Wash. 2009).

1 In their motion, defendants argued that if plaintiffs are asserting a RESPA claim, it fails
2 as a matter of law because (1) they provided plaintiffs with GFE's, and (2) even if they did not
3 provide the GFE's, RESPA does not provide a private right of action for that omission.
4 Plaintiffs failed to respond to those arguments, which the Court construes as a concession that
5 defendants' arguments have merit. Even if plaintiffs had asserted a RESPA claim, it fails as a
6 matter of law.


7 Plaintiffs also assert a claim for injunctive relief preventing defendants from selling their
8 property at a trustee's sale. However, their request for injunctive relief is based on claims that
9 lack merit as set forth above, so injunctive relief is unwarranted.

10 Plaintiffs contend that if the Court is inclined to grant the motion to dismiss, it should
11 allow them leave to amend their complaint. However, no amendment can remedy the fact that
12 plaintiffs' TILA claim is time barred and fails as a matter of law. Nor have plaintiffs suggested
13 any proposed amendments that would remedy the deficiencies in their amended complaint.
14 Accordingly, the Court declines to grant leave to amend.

15 III. CONCLUSION

16 For all of the foregoing reasons, the Court GRANTS defendants' motion to dismiss (Dkt.
17 #9). The Clerk of the Court is directed to enter judgment in favor of defendants and against
18 plaintiffs.

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20 DATED this 17th day of December, 2010.

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23 Robert S. Lasnik
24 United States District Judge
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